Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

Supreme Court, U.
FILED
NOV 2 1972
MICHAEL RODAK, JR.,

MRS. BILLIE MCCLURE,

Petitioner,

—v.—

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

MARVIN M. KARPATKIN
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

WILLIAM R. KING
EDWARD L. GREENBLATT
HAAS, HOLLAND, LEVISON & GIBERT
2709 First National Bank Tower
Atlanta, Georgia 30303

Attorneys for Petitioner

Of Counsel:

MARVIN M. KARPATKIN
WILLIAM R. KING
STEVEN DELIBERT

November 2, 1972

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

—v.—

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioner respectfully moves this Court for an order: (1) vacating its denial of the petition for writ of certiorari, entered on October 10, 1972; and (2) granting the petition.

As grounds for this petition, petitioner states the following:

I.

The denial of the petition for a writ of certiorari for want of timeliness appears to announce a new rule of law.

On October 10, 1972, this Court entered an order denying certiorari in this case, accompanying the denial with the unexplained statement that the petition was denied "for the reason that the petition was not timely filed." The

petition, however, was filed on July 24, 1972, which was within ninety days of the action of the Court of Appeals for the Fifth Circuit in partially granting and partially denying a timely petition for rehearing, so designated, which had been filed in that court by petitioner herein.[1] The issues presented by the rehearing petition below are presently before this Court; see footnote 4, *infra.*

This Court's unexplained statement that the petition for certiorari was not timely filed has taken petitioner completely by surprise; while it is true that respondent, in its brief in opposition to the granting of certiorari, raised several arguments concerning the timeliness of the petition, petitioner believed that her reply brief, filed on September 15, 1972, had made clear that none of the authorities cited by respondent in any way supported the argument that the petition was not timely.

Counsel for petitioner respectfully state to this Court that after diligent research, not a single case or other authority has been found which even intimates that a petition for a writ of certiorari in a civil case may be denied for want of timeliness, where, as here, (1) the petition was filed within 90 days of the disposition by a United States Court of Appeals, (2) of a petition for rehearing in that court, (3) so designated, and (4) timely filed. The rule that such a petition for certiorari is timely has been

[1] This Court has in the past granted petitions for certiorari which had previously been denied, where the denial had been based on a defect in jurisdiction subsequently shown by a petition for rehearing to have been cured or to have been nonexistent. Cf. *Cafeteria Employees Union, Local 302* v. *Angelos,* cert. denied, 319 U.S. 753, cert. granted, 319 U.S. 778 (1943); *Bakery & Pastry Drivers* v. *Wohl,* cert. denied, 313 U.S. 572, cert. granted, 313 U.S. 548 (1941); *Brady* v. *Terminal R.R. Ass'n,* cert. denied, 302 U.S. 688, cert. granted, 302 U.S. 678 (1937); and see Stern & Gressman, SUPREME COURT PRACTICE, §15.7 at p. 526 (4th ed. 1969).

applied with absolute uniformity regardless of the nature of the case involved, or of the contents of the petition for rehearing in the lower court. See especially, *United States* v. *Healy,* 376 U.S. 75, 77-80 (1964), and cases cited. See also Stern & Gressman, SUPREME COURT PRACTICE, §§6.3-6.4, at pp. 248-252 (4th ed. 1969).

If this Court indeed intended by its order of October 10, 1972, to announce a new doctrine, limiting the effect of a petition for rehearing in the court of appeals, in tolling the permissible time for petitioning for certiorari, it is respectfully submitted that at the least, this Court should make clear to the members of its Bar the extent of the new doctrine and its full ramifications. The effect of the October 10 order is to leave in doubt whether it is intended that *no* petition for rehearing is of any effect in tolling the 90-day period, or whether such tolling effect depends upon the contents of the petition.[2]

Should this Court adopt a rule whereby a timely petition for rehearing in the court below could be of no effect, or only limited effect, in tolling the period for seeking certiorari, such a rule would have the most unfortunate consequences for the orderly administration of justice.

Should it be determined that a rehearing petition could never have any tolling effect, this Court would then be faced repeatedly with petitions for certiorari filed while the court below was still considering a petition for re-

[2] It is clear that subsequent editions of treatises and manuals on Supreme Court practice will have to take note of this Court's order, as modifying the prior consistent practice of this Court. (Conversation between counsel for petitioner and Eugene Gressman, Esq.) But we respectfully urge that the full impact of the change intended to be wrought is no clearer to the treatise writers than to counsel for petitioner.

hearing. Such petitions would of necessity be seeking review of decisions still readily subject to change by the court below, and plainly wanting in that degree of finality necessary for this Court's review. Cf. *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943); *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942).

As this Court has observed in the past, in similar circumstances, such a ruling:

> "... could, in some cases, impose an added and unnecessary burden of adjudication upon this Court. It would be senseless for this Court to pass on an issue while a motion for re-hearing is pending below...." *United States* v. *Healy, supra,* 376 U.S. at 80 (footnote omitted).

Similarly, if this Court adopts a rule that the tolling effect of a timely petition for rehearing in the court below is dependent upon the content of that petition, cautious counsel would assuredly deem it the only prudent course to file a petition for certiorari before the lower court had disposed of a rehearing petition. Otherwise petitioner and counsel would invariably run the risk that the petition may be found not to have raised sufficient substantive matters to have tolled the running of the period for petitioning for certiorari.

Such a rule would also add substantially to the already heavy burdens of the courts of appeals. Surely no attorney seeking rehearing of any portion of such a court's ruling would dare to neglect raising any remotely conceivable ground for rehearing, no matter how futile, for fear that the rehearing petition would later be found not to reach

matters sufficiently substantive to have tolled the 90-day period.

Indeed, in the present case, counsel for petitioner in the court below made no secret of petitioner's dissatisfaction with that court's ruling.[3] Rather, however, than waste the time of both counsel and the court in presenting anew arguments which the court had already rejected unanimously, counsel presented only those arguments which appeared to have the greatest likelihood of rehearing.[4] Surely it is not the intention of this Court to encourage counsel to act otherwise. Nor should this Court's jurisdiction be defeated simply because counsel for appellant in the Court of Appeals did not add to the petition for rehearing the five additional words: "Appellant renews all prior arguments."

II.

Consideration of this Court's jurisdiction should at least be postponed until it may be fully briefed and argued by the parties.

While it is not the usual practice of this Court to permit argument on the issue of whether certiorari should be granted, there are nevertheless exceptions "where there are serious jurisdictional problems in a case involving other-

---

[3] "Appellant's silence with regard to the other aspects of the Court's judgment should not be construed as indicating agreement therewith." See Brief of Respondent in Opposition to Petition for Certiorari, at 27.

[4] It should also be observed that the main argument of the petition for rehearing went to the very important question of provision for costs in an equal employment case where private counsel is necessary. Relief was granted in part and denied in part by the court below in its disposition of the petition for rehearing, and the question was placed before this Court by the petition for certiorari (see Point IV, pp. 23-25).

wise important issues, making it inappropriate to deny the petition summarily . . . " Stern & Gressman, SUPREME COURT PRACTICE, §5.3, at pp. 207-208 (4th ed. 1969). See, e.g., *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420, 423-424 (1960); *Boynton* v. *Hutchinson Gas Co.,* 291 U.S. 656, 292 U.S. 601 (1934), as discussed in *Coleman* v. *Miller,* 307 U.S. 433, 444 (1939).

The present case is precisely such an important case, and should not be summarily denied. Without repeating the matters raised in the petition for certiorari, suffice it to say that there are involved questions of the rights of many thousands of female employees of religious organizations, and of whether Congress may enact equal employment opportunity legislation to protect these rights without transgressing the commands of the Constitution.[5]

Moreover, the many considerations of judicial administration and efficiency which we have already discussed (see Point I, *supra*) surely would favor this Court's not reaching a summary decision without the benefit of full briefing and argument on the issues raised.

---

[5] As a further indication of the importance of this case, petitioner would note the filing of a brief *amicus curiae* by the National Organization for Women. Petitioner has also been informed that numerous religious bodies within the United States have expressed their great interest in obtaining a resolution of the issues here presented and are considering the filing of briefs *amici curiae,* should certiorari be granted.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays this Court to grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

MARVIN M. KARPATKIN
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

WILLIAM R. KING
EDWARD L. GREENBLATT
HAAS, HOLLAND, LEVISON & GIBERT
2709 First National Bank Tower
Atlanta, Georgia 30303

Attorneys for Petitioner

Of Counsel:

MARVIN M. KARPATKIN
WILLIAM R. KING
STEVEN DELIBERT*

November 2, 1972

---

* Passed New York bar examination, and currently awaiting admission.

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for re-hearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

MARVIN M. KARPATKIN